

**CITY OF CLEVELAND
CALLED COUNCIL MEETING
AUGUST 28, 2018
MINUTES**

CALLED COUNCIL MEETING

The Called Council Meeting of the Mayor and Council of the City of Cleveland was called to order by Mayor Shan Ash at 6:30 p.m.

COUNCIL MEMBERS PRESENT: Nan Bowen, Annie Sutton, Kevin Stanley, and Bradley Greene.

APPROVAL OF AGENDA

On motion by Bradley Greene, seconded by Annie Sutton, in favor – Nan Bowen and Kevin Stanley and carried unanimously, the Mayor and Council approved the agenda for the Called Meeting of August 28, 2018.

RON CANTRELL – OAK SPRINGS SCHOOL RENOVATION

Mr. Ron Cantrell came before the council to discuss the progress of the plans to renovate the Oak Springs School. The former school will temporarily house the police department.

Mr. Cantrell explained the floor plan was designed for the use of the police department and council meeting room, but can be converted to a community center in the future with little modifications. A “sally port” has been added to the south entrance of the building. Two bathrooms will be converted for public use, while the back bathrooms will be used for the police department. For cost consideration, Mr. Cantrell removed the original designed exterior showing a stone base and kept with the existing brick. The sign on the building will read Oak Springs instead of Police Department. This will reflect the memory of the past use of the building.

Mr. Cantrell informed, once the council approves the floor and exterior design, he will start meeting with his engineers to develop plans for the renovation. The process should take about four to six weeks. Mr. Cantrell will then be able to get competitive bids and offer the council hard costs for the renovation. Mr. Cantrell will receive the results of the asbestos testing this week. He anticipates there will not be as much as much to abate as originally thought. Mr. Cantrell would like to have the building abated while the design plans are being developed.

On motion by Bradley Greene, seconded by Kevin Stanley, in favor – Nan Bowen, and Annie Sutton, and carried unanimously, the Mayor and Council voted to approve the site preliminary site plan and directed Mr. Cantrell to proceed with the engineering plans. The motion included to move forward with the abatement of the building while the plans are being designed.

TOM O’BRYANT – CITY ADMINISTRATOR

1. Appalachian Regional Commission Grant Update

- a. In April 2018 the City applied for an Appalachian Regional Commission Grant requesting funding assistance in the amount of \$274,534 for water line improvement upgrade from the Warrior Tank to FNOK.
- b. The amount requested will fund 50% of the project costs. The City’s cost share of the project is \$174,535. White County is also contributing \$100,000 to the project.
- c. The City received last Wednesday, August 22, 2018 that the grant application was approved.
- d. Council will need to officially accept the grant and approve the Mayor to sign the appropriate agreement and certification forms.

TOM O'BRYANT – CITY ADMINISTRATOR – continued

On motion by Nan Bowen, seconded by Annie Sutton, in favor Kevin Stanley and Bradley Greene, and carried unanimously, the Mayor and Council voted to accept the Appalachian Regional Commission Grant in the amount of \$274,534.00 for the water line upgrade on Hulsey Road. Mayor Ash was given authorization to sign all documents.

Mr. O'Bryant informed he will contact Georgia Mountains Regional Commission to administer the grant.

2. Right of Way Service Agreement with North Georgia Network

- a. The North Georgia Network (NGN) provides fiber optic internet services to the North Georgia Region, including the White County/City of Cleveland area.
- b. NGN, which is a partner with HEMC, normally uses existing HEMC telephone/power poles to carry to fiber optic wire needed for such broadband service. They have been using poles within Georgia DOT right of way
- c. Approximately one year ago the city sent NGN a franchise service agreement so they could service customers within the city limits, but NGN stated that they were not a television or telephone company so the standard franchise agreements do not apply to them. So, no action was taken at that time by the company to service potential customers in the City.
- d. NGN currently has a client within the city that they would like to serve, but must encroach on city right of way.
- e. City code states that any utility that wants to use city right of way must have a service agreement with the city.
- f. City staff has been working with GMA Local Government Service to develop a model service agreement that can apply to the types of services provided by NGN and will comply with city code of operating within city right of way and also compensate the city for use of the right of way.
- g. Mayor and Council will need to approved the model agreement to send to NGN for their review and approval

Grant Keene, City Attorney, submitted a six page review noting thirty-eight points of concern with the agreement. Mr. Keene did not specifically go over every point but is included hereto as reference:

1. The title of the proposed Ordinance/Agreement states that it is for the purpose of granting non-exclusive access to publicrights-of-way forthe purpose constructing and maintaining... (emphasis supplied) fiber optic lines. Title does not include as allowed purposes "installing", "repairing" and purpose of The operating and the title is ambiguous as to whether one line or multiple lines are authorized by the ordinance.

2. In the first Whereas of the Ordinance/Agreement the party identified as North Georgia Network Cooperative, Inc. is not identified as a Georgia corporation.

3. In the second Whereas of the Ordinance/Agreement the term fiber-optic line is singular and the requested authority is only to maintain and construct such line (to install, to repair, and to operate are not mentioned as authorized uses).

4. In the third Whereas of the Ordinance/Agreement the City is stated to wish to accommodate and allow only the Company¹'s request maintain fiber-optic lines (emphasis supplied). No mention is made of any request by the Company to construct, install, repair, and operate such lines.

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5. In the paragraph following the Now, Therefore, Be It Ordained..., statement the City Council alone (the Mayor is not mentioned) is declared to have granted certain non-exclusive rights for ... constructing, maintaining and operating a fiber-optic lineS. (sic) As noted above this is ambiguous as to the intent of the City. Is it intended that the grant be for one or more fiber-optic lines throughout the Ordinance/Agreement?

6. Following the ordained the following provisions are set forth under clause the caption or title of AGREEMENT.

7. In the paragraph following the AGREEMENT caption, the word City is repeated after the term City of Cleveland.

8. In Section 1.2 (of Defined Terms) the term Code is stated to refer to the City of Cleveland Georgia Municipal Code of Ordinances", but does not also state that such term includes adopted ordinances not yet codified, and the codes, rules, and regulations adopted and to be adopted by the City.

9. In Section 1.4 (of Defined Terms) the term Governing Body is stated to be the City Council and the term "Governing Body" does not expressly include the Mayor of the City of Cleveland as a necessary part of said Governing Body.

10. Section 1 ("Defined Terms") does not include a definition of the term "System" which is used throughout the Agreement.

11. In Section 1.6 (of " Defined Terms") the term Rights-of-way is defined as any public street... held by the City (emphasis supplied) or location (emphasis supplied) within the City which shall entitle the City and the Company (emphasis supplied) to use same... for the purpose installing, operating, repairing and maintaining the System. This provision seems to apply only to City held rights-of-way except when it then refers to or location within the City. No mention is made of operating the System. I know of no existing City Rights-of- Way which when created, by grant or by dedication, expressly authorized the Company to use said Rights-o f-way. It would also seem prudent to state that this granted authority did not extend to rights-of-way controlled by the Georgia Department of Transportation.

12. In Section 1.7 (of Defined Terms) a Provider is not limited to the Company, and the term Facilities is not defined therein or in Section 1 ("Defined Terms)

13. In the first paragraph of Section 2 (Grant of Authority) the City is shown to grant to the Company the non-exclusive and limited authority to construct, install and maintain fiber-optic lines.... The authority to operate and to Repair is not included. The Company agrees not is not to expand or extend the System described and depicted in the Exhibit A (which is to be attached) without approval from the City Council (but not without the prior approval of the Mayor and Council). Said first paragraph of said Section 2 bars the provision of Video Services by the Company (which term is not defined) unless the Company enters into a Cable Television franchise agreement with the City. This existing provision is silent as to whether or not streaming video or other internet sourced video (as in Netflix, YouTube, Hulu, CNN, etc.) are included within the term Video Services and silent as to whether or not streaming video or other internet sourced video are permitted to be delivered over the Company's fiber-optic lines, and said existing provision does not declare that such streaming video or other internet sourced video is also barred unless the Company enters into a Cable Television franchise agreement with the City. A clear statement concerning the status of such streaming video" or other internet sourced videos would seem to be required. In the opinion of the undersigned, the transmission over the Company's System of "streaming video or other internet sourced videos (if not expressly allowed by the Agreement) should be declared to be a material breach of this Agreement.

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However, if such "streaming video" or other internet sourced videos are to be barred from being transmitted over the System, and the Ordinance/Agreement is enacted then, I am concerned that such a bar would be unenforceable as a practical matter (even if otherwise found to be lawful}, since the City would be unable to monitor how the users of the Company's System actually use said System. If it is intended by the parties to this Agreement (the Company and the City) that an agreement by the Company not to transmit over the Company's System (located on the City's Rights-of-Way) such

"streaming video or other internet sourced video will somehow allow the Company to operate outside the legal requirements of the typical Cable Television franchise agreement" framework, and if the City, when entering into such an agreement has no practical method of determining whether or not the System is being used in contravention of such an agreement, then it is my concern that the City could be attacked because the Mayor and Council had entered into an agreement which could not be enforced and which allowed the Company to escape the requirements of the typical "Cable Television franchise agreement" framework to the detriment of the City, in that such a framework is generally acknowledged to provide a degree of protection of the interests of the City and which framework exists within a developed field of law.

14. Section 2.1 (of Grant of Authority) contains the clause nor that it is not required 1 which clause creates an ambiguity as to whether the Company could assert some or all of the stated requirements are not required of the Company.

15. In Section 2.2 (of Grant of Authority) the use of city streets is as required by Section -43-62 of the Georgia Code, but no mention is made of the

City's ordinances regarding the Rights -of-Way as defined in the proposed Ordinance. Also a Georgia Code Section -43 -62 is mentioned as authority for the City's regulation of the use of streets; however, I do not find that the Georgia Code (O.C.G.A.) contains such a numbered provision.

16. In Section 3.1 (of Compensation) it is unclear that the Company shall pay the \$1,000.00 per mile of fiber optic cable installed on the City's Rights-of-Way, in advance, each and every year during the term of the Agreement (emphasis supplied). Also there is no annual inflation adjustment for such fee.

17. In Section 3.3 (of Compensation) the initial term of the Agreement is stated to be ten (10) years, unless sooner terminated as provided in the Ordinance and Agreement", and the Company or (emphasis supplied) the City shall have the option to renew the Agreement by giving written notice sixty (60) days before the expiration of the initial term. Is the Company allowed to renew the Agreement if the Company is in default under the terms of the Agreement? I do not find any limitation on how many times the Company could renew the Agreement, nor do I find that the City has the right to increase the fees to be paid by the Company upon renewal.

18. In Section 3.4 (of Compensation) the City reserves the right to grant the use of City Rights-of-Way to any person (this may be read as singular given the definition of "person" contained in Section 1.5 of Defined Terms") In the opinion of the undersigned this needs to be "person to persons".

19. In Section 4.1 (of Standards of Service) the Company is topresent to the City Engineer and Information Technology Director.... Please add or such other person or persons who may be designated by the City from time to time at all occurrences of said term City Engineer and Information Technology Director." Also this Section mandates plats are to be delivered, but maps" are to be of a certain scale. Please use the term plats and maps, rather than plats or maps

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20. In Section 4.2 (of Standards of Service) the Company is required to restore disturbances to the City's Rights-of-Way, but is not clear as to whether the Company is also obligated to restore any damages or disturbances to the City's infrastructure located within said Rights-of-Way (severed water lines 1 etc.), and the provision is silent as to the obligation of the Company to restore disturbances to the infrastructure of other permitted users of the City's Rights-of-Way. The term disturbance is not defined.

21. In Section 4.5 (of Standards of Service) please insert in to the first sentence as follows: ... of the System by or on behalf of the Company (insert) shall be performed.... Also in the second sentence remove the word substantial from the phrase ... performed in substantial compliance...

22. In Section 4.6 (of "Standards of Service") the Company is to comply with the minimum standards of the Company, unless in conflict with any applicable federal, state and local standards (if stricter). It would seem that this provision could be the source of endless conflict if the Company does not provide to the City a copy of such Company standards, and even then, the burden would be on the City to prove that such stricter standards exist and are applicable.

23. In Section 4.7 A (of Standards of Service) the City Engineer is given the authority to approve Rights-of-Way obstruction and excavation. Please add or such other person or persons who may be designated by the City from time to time.

24. In Section 4.9 (of Standards of Service") the Company is ... encouraged (emphasis supplied) to perform ... in a manner resulting in the least amount of damage and disruption to the rights-of-ways (sic). However, the Company is not required to do so.

This provision seems to contemplate that the Company will be allowed to damage the City's Rights-of-Way since it is only encouraged not to do so. The Company should be required to perform all work in a manner which minimizes damage to the City's Rights-of-way, and if such work produces damage, then all such damage shall be repaired in a timely manner (See Section 4.2). Also the City Engineer is given the authority to require trenchless technology. Please add nor such other person or persons who may be designated by the City from time to time.

25. In Section 5.3 (of Enforcement and Termination of Agreement) the hearing scheduling provision is difficult to understand given that the City has regularly scheduled meetings on the first two Mondays of each month.

26. In Section 5.4 D (of "Enforcement and Termination of Agreement) please add to the end of said sentence the phrase including but not limited to, monetary damages and attorney's fees;

27. In Section 5.4 E(2) (of Enforcement and Termination of Agreement) it is stated that in the case of a material default in the Agreement that the City could revoke the Agreement if it follows certain procedural requirements. Certain examples of agreed material defaults are set forth in Section 6.1 (of Default) of the Agreement. However, I do not find that any failure by the Company to abide by or perform the requirements of Section 4 (Standards of Service) is explicitly stated to constitute a material default in the Agreement. In the opinion of the undersigned such omission should be remedied.

28. In Section 5.4 E(2) (of Enforcement and Termination of Agreement) the Agreement does not state what set of rules will govern the System during the pendency of any appeal made by the Company of the City's decisions to terminate the Agreement.

29. In Section 5.5 (of Enforcement and Termination of Agreement) the Company is stated not to be in default if the alleged default is the caused by ... strikes, acts of God, power outages or other events reasonably beyond its ability to control. The term power outages could be amended to read power outages not caused by or on behalf of the Company. The clause other events reasonably beyond its ability to control is very broad and vague.

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30. In Section 7 (Work in Rights-of-Way") the Company is required to obtain a permit from the City for excavations on the Right-of-Way, but the provision does not say that permits will be required for trenchless technology."

31. In Section 9 (Indemnity and Hold Harmless") the City is to be indemnified from and against matters ••• which arise from the negligence or willful misconduct, of the Company, its employees, agents, or subcontractors....Please add officers and representatives

32. In Section 10 (Disclaimer of Warranties) it is stated that the ••• Agreement shall not be construed to deprive (emphasis supplied) the City of any rights or privileges which it now has, or may hereafter have, to regulate the use and control of its streets. Please add to the end of said sentence the clause and shall not impair such rights and privileges of the City with regard to its streets and its Rights-of-Way.

33. In Section 13 (Payment of Costs) substitute the clause installation, repair, maintenance, and operation of the System for the existing clause installation, repair and maintenance of the System. Also add operation to the clause installation repair and maintenance" thereafter stated.

34. In Section 14 (Priority of Use") add a provision which explicitly state that the Company shall not be considered part of or included within the term public generally

35. In Section 15 (No tice) the notice to the City is required to sent to the City Manager rather than to the City Administrator.

36. In Section 18 (Assignment) the language of the provision appears to contemplate that this Agreement could be sold, transferred, assigned or otherwise encumbered or disposed of, either by forced or voluntary sale or otherwise, with the prior written consent of the City. Is the present form of this proposed agreement (even with the suggested changes) such that the City would be comfortable with another entity taking over and exercising the Company's rights under said Agreement and paying the same fees stated in this Agreement? In not, then the provision need to bar such transfers, or if such transfers are not to be bared, then any such transfer could be stated to result in a revocation and termination of the Agreement by the Company, except that the Company would remain obligated to the City for the performance of all duties and obligation originally imposed on the Company in the Agreement.

37. Section 23 ("Severability Clause") states that this Agreement (to be adopted as an Ordinance) that Any Ordinance heretofore adopted by the City Council of the City of Cleveland, Georgia, which is in conflict with this Ordinance is hereby repealed to the extent of such conflict. In the opinion of the undersigned this is a very dangerous provision in that the adoption of the Ordinance/Agreement repeals unspecified conflicting City ordinances, but the provision is silent upon the effect of a termination of the Agreement with respect to said repealed provisions of said unspecified conflicting City ordinance provisions. The Ordinance/Agreement is also silent as to the ownership of the installed System if the Ordinance/Agreement is terminated.

38. The Ordinance/Agreement is shown to be signed by the Mayor and the City Manager. The City has no City Manager and the City Administrator does not typically sign agreements on behalf of the City unless specifically authorized by the Mayor and Council. The City Administrator does not sign City ordinances. Also the Ordinance/Agreement is shown as having to be Approved and Accepted by the Company. An Ordinance of the City does not require acceptance and approval by the Company. An agreement between the City and the Company would need to be approved by both.

The above stated comments are largely directed toward the specifics of the proposed draft Ordinance/Agreement. I remain concerned that the proposed draft Agreement/Ordinance does not appear to be conceptually within the framework of a cable television franchise agreement which would authorize a multi-year agreement of this type between a Georgia municipal corporation and a private entity. I am also concerned that the procedures required for the enforcement of the Ordinance/Agreement are tilted in favor of the Company, and that such procedures impose a substantial burden on the City.

TOM O'BRYANT – CITY ADMINISTRATOR – continued

Bradley Greene asked if the company plans to stream videos. Mr. O'Bryant answered there is an exemption for internet providers and that is why the payment method is per mile rather than a user fee.

Kevin Stanley asked if the company could piggy back off of trail wave. Mr. O'Bryant answered trail wave is through HEMC and most of the city is powered by Georgia Power.

Mr. Keene and Mr. O'Bryant were directed by the council to work together to resolve any concerns with the agreement and report back at the September 10, 2018 council meeting.

NEW BUSINESS

1. On motion by Annie Sutton, seconded by Nan Bowen, in favor – Kevin Stanley and Bradley Greene and carried unanimously, the Mayor and Council approved the class requests for Beth Allen and Connie Tracas.
2. Public comments – Mayor Ash asked for comments. Dean Dyer, WRWH Radio, commented on Square Deal doing an excellent job on the repairs of Campbell Street. Mr. Dyer expressed his appreciation of how the project was expedited to reopen the road.
3. Annie Sutton asked Beth Truelove for comment. Ms. Truelove, White County Chamber, expressed the importance of North Georgia Network locating in the city.

ADJOURNMENT

On motion by Annie Sutton seconded by Kevin Stanley in favor – Nan Bowen and Bradley Greene, and carried unanimously, the Mayor and Council voted to adjourn the City Council Meeting of August 28, 2018 at 7:03 p.m.



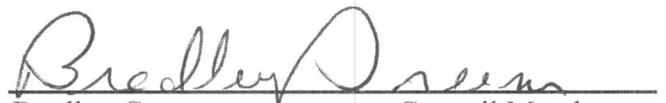
Shan Ash, Mayor



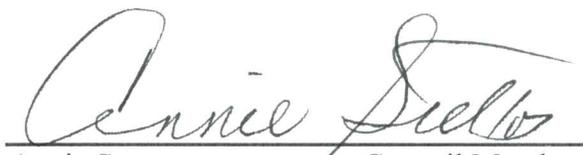
Kevin Stanley, Council Member



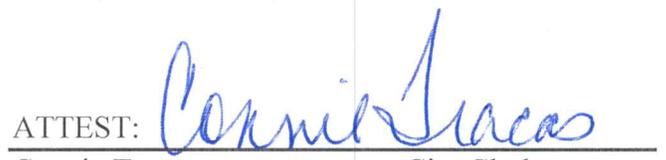
Nan Bowen, Council Member



Bradley Greene, Council Member



Annie Sutton, Council Member

ATTEST: 

Connie Tracas, City Clerk

